

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE MATTER OF THE ADOPTION OF M.A.E., A CHILD

W.E. and D.E.,

Petitioners and Appellees,

v.

Supreme Court No.

Grand Forks Co. No. 18-2020-DM-328

L.H., natural father, and

The Department of Human Services,

Respondents and Appellant.

APPELLANT'S BRIEF

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND
TERMINATING PARENTAL RIGHTS ENTERED MAY 24, 2021. DONALD HAGER,
JUDGE OF THE NORTHEAST CENTRAL COURT, PRESIDING.Rhiannon Gorham
405 Bruce Ave, Ste 101
Grand Forks ND 58201
701-795-3910
Attorney for Appellant
N.D. Bar No. 06545

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES PRESENTED FOR REVIEW	iii
STATEMENT OF THE CASE	¶ 1
STATEMENT OF THE FACTS	¶¶ 2 - 8
JURISDICTIONAL STATEMENT	¶ 9
STANDARD OF REVIEW	¶ 10
LAW AND ARGUMENT	¶¶ 11 - 20
I. Whether the court erred by finding that M.E. had been abandoned.	¶¶ 11 - 15
II. Whether, if abandonment was found, the permanent termination of parental rights was the appropriate remedy in this matter	¶¶ 16 - 19
CONCLUSION	¶ 20

TABLE OF AUTHORITIES

NORTH DAKOTA CONSTITUTION

N.D. Const. art. VI. ¶9

NORTH DAKOTA STATUTES

N.D.C.C. § 14-15. ¶ 3, 9, 11, 12, 13, 16

N.D.C.C. § 27-20 ¶ 9, 11, 13

NORTH DAKOTA CASES

Anderson v. Baker, 2015 ND 269, ¶7, 871 N.W.2d 830. ¶ 16

In re Adoption of H.G.C., 2009 ND 19, 761 N.W.2d 565 ¶ 13

In re Adoption of I.R.R., 2013 ND 211, ¶11, 839 N.W.2d 846. ¶ 14

Interest of C.A.R., 2020 ND 209, 950 N.W.2d 186 ¶ 13, 14, 16

Interest of K.J., 2010 ND 46, 779 N.W.2d 635 ¶ 10

Interest of M.B., 2006 ND 19, 709 N.W.2d 11 ¶ 10

Matter of Adoption of K.S.H., 422 N.W.2d 417 (N.D. 1989) ¶ 16

Matter of C.D.G.E., 2017 ND 13, ¶4, 889 N.W.2d 863. ¶ 16

NORTH DAKOTA RULES

N.D.R.App.P. 2.2. ¶ 9

N.D.R.Civ.P. 52. ¶ 10

AUDIO REFERENCES

The Termination and Adoption Hearing for this matter was conducted on April 27, 2021. The audio recording the hearing is referred to as Trial Recording (TR) by file name and time stamp. For reference, the order of witness examination is as follows:

qs86b90r (“r”)

qs86b90s (“s”)

qs86b90t (“t”) direct examination L.H.

qs86b90u (“u”) direct examination L.H., court examination L.H. , cross examination L.H.

qs96b90v (“v”) cross examination L.H., re-direct examination L.H., direct examination W.E.

qs86b90w (“w”) direct examination W.E.

qs86b90x (“x”) direct examination W.E., cross examination W.E.

qs86b90y (“y”) cross examination W.E., re-direct examination W.E.

qs86b90z (“z”) re-direct W.E., direct examination D.E.

qs86b910 (“0”) direct examination D.E., cross examination D.E., re-direct examination D.E.

qs86b911 (“1”) re-direct examination D.E.

STATEMENT OF THE ISSUES

- I. Whether the court erred by finding that M.E. had been abandoned.
- II. Whether, if abandonment was found, the permanent termination of parental rights was the appropriate remedy in this matter.

STATEMENT OF THE CASE

¶1 This is an appeal from the Order Terminating Parental Rights of L.H. entered in the Grand Forks County District Court. (Register of Actions, Index # 55; Appendix (“App.”) 9 - 20). On July 1, 2020, a Petition for Involuntary Termination of Parental Rights and Adoption was filed in the Juvenile Court, asking the Trial Court to terminate the parental rights of L.H. (Index # 2, App. 5 - 8). The petition to terminate L.H.’s parental rights was tried on April 27, 2021, before the Honorable Donald Hager, Judge of the District Court. (See Trial Recording (“TR”). The Findings of Fact, Conclusions of Law and Order Terminating Parental Rights of [L.E.] was filed on May 24, 2021 (Index # 55; App. 9 - 20).

STATEMENT OF FACTS

¶2 The minor child in this matter, M.E., was born in 2008 (App. 5, ¶ 2, TR v 00:22). Since his birth, mother W.E. has had primary residential responsibility of M.E. (App. 5, ¶ 3, TR v 09:38). Paternity was previously established identifying L.H. as M.E.'s biological father. (App. 5, ¶2, TR t 06:47, v 05:44, w 05:15, w 08:05) L.H. had periodic contact with M.E. during his early childhood (TR u 05:22, w 05:50). L.H. has been incarcerated for portions of M.E.'s life and is currently incarcerated pending a proposed appeal. (TR t 08:55, u 06:50). At the time of the filing of the Petition, W.E. had been in a relationship with D.E. for approximately 3 years and was married to D.E. in 2019. (App. 6, ¶ 10, TR v 09:44, TR z 05:46). D.E. wishes to adopt M.E. (TR 0 00:24).

¶3 A Petition for Termination of Parental Rights and Adoption was filed in the District Court on July 1, 2020. (Index # 2; App. 5 - 8). In the Petition, W.E. and D.E. allege that L.H. has abandoned his child under N.D.C.C. § 14-15-19(3)(a). (App. 6, ¶ 8) The Petitioners further assert that it is in M.E.'s best interests that the parental rights of L.H. be terminated and M.E. be adopted by D.E. (TR x 00:10).

¶4 A trial in this matter came before the court on April 27, 2021. As L.H. was currently incarcerated in a federal penitentiary (TR t 01:11, u 06:50), the court allowed him to be called out of order and present testimony, and be subject to cross examination, as the first witness. (TR t 00:00) L.H. was allowed to participate in approximately one-half hour of the trial after his cross examination was concluded. (TR x 05:16).

¶5 L.H. testified that he had last seen his son in 2010 or 2011. (TR u 05:22). L.H. testified that he had been incarcerated for different periods of M.E.'s childhood (TR u 06:50, TR u 08:54, TR v 00:55). Although L.H. testified that his current sentence release date was after

M.E.'s 18th birthday, L.H. explained that he could obtain early release depending on the success of his proposed appeal. (TR t 08:55, TR u 06:50). L.H. testified that M.E. was never involved in any of the incidents that led to criminal charges or convictions. (TR v 07:34). L.H. testified to his appreciation for the parenting abilities of W.E. and D.E. (TR t 03:36, TR t 04:00), expressing a willingness to voluntarily sign over guardianship rights to D.E., rather than fully sever his parental rights. (TR t 04:55, TR u 01:30). L.H. testified M.E. deserved to know the other side of his family. (TR u 01:10). L.H. testified that he would welcome contact with M.E. but would respect W.E.'s parenting decisions on whether or not to allow contact. (TR u 2:48, TR u 03:30, TR y 06:54, TR 0 07:52).

¶6 W.E. testified that L.H. had two in person visits with M.E. when he was 3 weeks old and 9 months old. (TR w 06:11). W.E. testified the L.H. had a couple phone visits before M.E. was four years old, but no contact since. (TR w 06:39) W.E. testified that she received minimal financial support from L.H. (TR w 07:57, TR w 08:28, TR x 08:32). W.E. testified that she was not comfortable with M.E. having contact with L.H. due to his criminal history, which she had shared with M.E. (TR y 03:03, TR y 06:52).

¶7 W.E. testified that D.E. has provided for M.E. and it would be in M.E.'s best interests for L.H.'s parental rights to be severed and M.E. to be adopted by D.E. (TR x 00:10).

¶8 D.E. testified that he and M.E. have a parent-child relationship, although M.E. is old enough to know that D.E. is not his biological father. (TR z 07:05, TR z 08:20). D.E. testified that he believed it is in M.E.'s best interests that L.H.'s parental rights are terminated and that D.E. adopt M.E. (TR 0 02:05, TR 1 03:41).

JURISDICTIONAL STATEMENT

¶9 This court has jurisdiction to hear this appeal under N.D. Const. art. VI, §§ 2 and 6, under N.D.C.C. §§ 27-20-56(1) and 14-15-15, and N.D.R.App. P. 2.2.

STANDARD OF REVIEW

¶10 A court's decision to terminate an individual's parental rights is a question of fact, and that decision will not be overturned unless it is clearly erroneous. Interest of M.B., 2006 ND 19, ¶ 13, 709 N.W.2d 11. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, no evidence exists to support it, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made. Interest of K.J., 2010 ND 46, ¶ 5, 779 N.W.2d 635. Findings of fact, including findings in juvenile matters, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility. N.D.R.Civ.P. 52(a)(6).

ARGUMENT

I. Whether the court erred by finding that M.E. had been abandoned.

¶11 Under the Revised Uniform Adoption Act, N.D.C.C. § 14-15-19(1):

The rights of a parent with reference to a child, including parental right to control the child or to withhold consent to an adoption, may be relinquished and the relationship of parent and child terminated in or before an adoption action as provided in this section.

See also N.D.C.C. § 27-20-44, Uniform Juvenile Court Act.

¶12 W.E. and D.E. specifically brought this action pursuant to N.D.C.C. § 14-15-19(3)(a)

(App. 6, ¶ 8), which states:

3. In addition to any other action or proceeding provided by law, the relationship of parent and child may be terminated by a court order issued in connection with an adoption action under this chapter on any ground provided by other law for termination of the relationship, and in any event on the ground:

a. That the minor has been abandoned by the parent;

¶13 Abandonment is defined under the Revised Uniform Adoption Act as:

1. "Abandon" means:

a. As to a parent of a child not in the custody of that parent, failure by the noncustodial parent significantly without justifiable cause to:

(1) Communicate with the child; or

(2) Provide for the care and support of the child as required by law.

b. As to a parent of a child in that parent's custody:

(1) To leave the child for an indefinite period without making firm and agreed plans, with the child's immediate caregiver, for the parent's resumption of physical custody;

(2) Following the child's birth or treatment at a hospital, to fail to arrange for the child's discharge within ten days after the child no longer requires hospital care; or

(3) To willfully fail to furnish food, shelter, clothing, or medical attention reasonably sufficient to meet the child's needs.

N.D.C.C. § 14-15-01, see also N.D.C.C. § 27-20-02(1) (identical language). W.E. and D.E., as

the parties seeking termination of L.H.'s parental rights, have the burden of proving all the

elements by clear and convincing evidence. See Interest of C.A.R., 2020 ND 209, ¶8, 950 N.W.2d 186, citing In re Adoption of H.G.C., 2009 ND 19, ¶10, 761 N.W.2d 565.

¶14 H.L. provided testimony that he was initially unsure of his biological and legal parental rights to M.E. until paternity (through testing) was confirmed. (TR t 06:47, TR v 05:44). H.L. provided testimony that he had contact with M.E. during M.E.'s childhood, which W.E. acknowledged. (TR u 05:22, TR w 06:11). The later lack of contact during H.L.'s periods of incarceration was not based on H.L.'s lack of interest in M.E., but rather a deference for W.E.'s parenting decision to not allow M.E. to have contact with him while incarcerated. (TR u 2:48, TR u 03:30, TR y 06:52, TR z 03:29). W.E. testified that she would not be comfortable with M.E. having contact with H.L. during his incarceration. (TR y 03:03). L.H.'s involvement with his son is not a "casual display of interest," (Interest of C.A. R., ¶7, citing In re Adoption of I.R.R., 2013 ND 211, ¶11, 839 N.W.2d 846) but rather a balance of wanting to maintain a connection between M.E. and his paternal biological family while respecting W.E.'s decision. While W.E. expressed concern for the impact of L.H.'s criminal history on M.E.'s best interests, L.H. testified that M.E. was not involved in any of the activity that lead to his criminal charges. (TR v 07:34, see also TR y 04:10). In fact, it was W.E. and D.E. themselves who made M.E. aware of the information that they were concerned would impact M.E. (TR y 03:03). L.H. provided testimony that M.E. had different individuals as parental roles in his life, but wanted to provide the consistency of M.E.'s biological family regardless of the other relationships M.E. developed. (TR t 02:53).

¶15 W.E. and D.E. have not proven abandonment by clear and convincing evidence, the district court's finding that they had was clearly erroneous.

I. Whether, if abandonment was found, the permanent termination of parental rights was the appropriate remedy in this matter.

¶16 “The rights of a parent with reference to a child [...] **may** be relinquished and the relationship of the parent and child terminated in or before an adoption action as provided in this section.” N.D.C.C. § 14-15-19(1), (emphasis added). “[W]hen used in a statute, the word “may” is ordinarily understood as permissive rather than mandatory and operates to confer discretion.” Interest of C.A.R., ¶9, citing Matter of Adoption of K.S.H., 422 N.W.2d 417, 420 (N.D. 1989). “If a petition meets the clear and convincing standard of proof, then the court has discretion under N.D.C.C. § 14-15-19 to decide whether to terminate parental rights.” Interest of C.A.R., ¶9, citing Matter of C.D.G.E., 2017 ND 13, ¶4, 889 N.W.2d 863. “A district court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, if its decision is not the product of a rational mental process leading to a reasonable determination, or if it misinterprets or misapplies the law.” Anderson v. Baker, 2015 ND 269, ¶7, 871 N.W.2d 830.

¶17 Terminating L.H.’s parental rights is an available option in this matter; however, termination of parental rights should never be used as a tool of convenience. Here, the legal parental bond to L.H. has not been shown to have a negative impact on M.E.’s ability to develop a loving, supportive, and stable relationship with D.E. (TR u 00:49, TR u 01:41, TR x 09:44, TR y 04:38, TR z 08:20, TR 0 00:16). The need for a parent to no longer have ties to the other biological parent of their joint child may be preferable. However, it is not necessary in this case and there are less extreme measures that can be utilized to achieve the same goals, such as guardianship and legal name changes by express permission of the other parent. (TR t 04:48, TR t 04:55).

¶18 The permanent and severe termination of parental rights against a parent's wishes should be a last resort and used to address the welfare and best interests of a child. (TR t 01:51, TR u 00:26). Here, the continued legal ties between L.H. and M.E. has not and does not pose a threat of harm to the child (TR x 06:54). No testimony has been presented of a specific instance where L.E.'s legal parental ties to M.E. has prevented D.E. from fulfilling his role as a father figure to M.E. (TR y 04:38, TR z 08:20). L.H. has expressed that his position is not to replace any established role D.E. has in M.E.'s life (TR u 2:26, TR u 03:44).

¶19 Terminating L.H.'s parental rights is an unreasonable and severe remedy under the circumstances of this case, a clearly erroneous finding by the district court.

CONCLUSION

¶20 The district court abused its discretion in terminating L.H.'s parental rights to M.E. and the Order for Terminating Parental Rights should be reversed.

Submitted this 23rd day of June, 2021.

Rhiannon Gorham
ND Attorney No. 06545
Attorney for Appellant
405 Bruce Ave, Ste 101
Grand Forks ND 58201
701-795-3910
gfpublisher@nd.gov

CERTIFICATE OF COMPLIANCE

I certify that the brief submitted above complies with the page limitation set for in the North Dakota Rules of Appellate Procedure.

Dated this 23rd day of June, 2021.

Rhiannon Gorham

ND Attorney No. 06545
Attorney for Appellant
405 Bruce Ave, Ste 101
Grand Forks ND 58201
701-795-3910
gfpublisher@nd.gov

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE ADOPTION OF M.E., A CHILD

W.E. and D.E.,

Petitioner and Appellee,

v.

Supreme Court No.

Grand Forks Co. No. 18-2020-DM-00328


L.H., father,

Respondent

Appellant.

The Executive Director of the Department of
Human Services of the State of North Dakota,
Respondent.

CERTIFICATE OF SERVICE

 The undersigned, being of legal age, being first duly sworn deposes and says that on the day of June, 2021, she served true copies of the following documents:

Notice of Appeal
Order for Audio Recording
Appellant's Brief
Appellant's Appendix

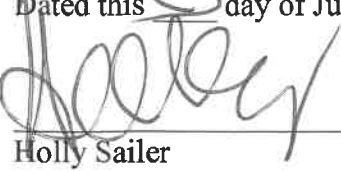
And that said copies were served upon:

Gretchen Handy
Email: gretchen@hglaw.net

Department of Human Services
Email: dhscfsadoptunit@nd.gov
by email.

L.H.
c/o USP Coleman I
846 NE 54th Terrace
Sumterville FL 33521

Dated this 23 day of June, 2021.



Holly Sailer

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE ADOPTION OF M.E., A CHILD

W.E. and D.E.,

Petitioner and Appellee,

v.

Supreme Court No.

Grand Forks Co. No. 18-2020-DM-00328

L.H., father,

Respondent

Appellant.

The Executive Director of the Department of
Human Services of the State of North Dakota,
Respondent.

CERTIFICATE OF SERVICE

23 The undersigned, being of legal age, being first duly sworn deposes and says that on the day of June, 2021, she served true copies of the following documents:

Corrected Appellant's Brief

Corrected Appellant's Appendix

And that said copies were served upon:

Gretchen Handy

Email: supportstaff@hlglaw.net

Department of Human Services

Email: dhscfsadoptunit@nd.gov

by email.

L.H.

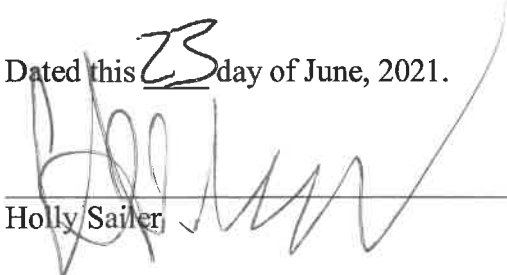
c/o USP Coleman I

846 NE 54th Terrace

Sumterville FL 33521

Dated this 23 day of June, 2021.

Holly Sailer



IN THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE ADOPTION OF M.E., A CHILD

W.E. and D.E.,
Petitioner and Appellee,
v.

Supreme Court No.
Grand Forks Co. No. 18-2020-DM-00328

L.H., father,
Respondent
Appellant.

The Executive Director of the Department of
Human Services of the State of North Dakota,
Respondent.

CERTIFICATE OF SERVICE

23 The undersigned, being of legal age, being first duly sworn deposes and says that on the
day of June, 2021, she served true copies of the following documents:

Corrected Appellant's Brief

And that said copies were served upon:

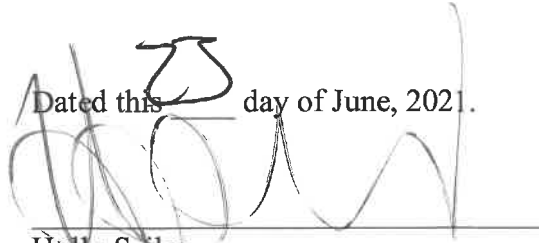
Gretchen Handy
Email: supportstaff@hlglaw.net

Department of Human Services
Email: dhscfsadoptunit@nd.gov

by email.

L.H.
c/o USP Coleman I
846 NE 54th Terrace
Sumterville FL 33521

Dated this 23 day of June, 2021.


Holly Sailer